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2015

In the Supreme Court of the United States

OCTOBER TERM, 2015

THE CHESAPEAKE & OHIO RAILWAY COMPANY, ET AL.,

Petitioners,

v.

THE UNITED STATES INTERSTATE COMMERCE COMMISSION, ET AL.,

Respondents.

On Appeal from the United States District Court for the Southern District of Ohio

SUPPLEMENTAL APPENDIX FOR THE UNITED STATES INTERSTATE COMMERCE COMMISSION

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 201.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY ET AL., APPELLANTS,

vs.

THE INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Brief for the Appellants in Reply to the Supplemental Brief for the Appellee.

In Southern Pacific Company *vs.* Interstate Commerce Commission, 200 U. S., 556, cited by the appellee, the court held that if the *facts* alleged and proved showed a violation of section 5, the court might enforce the order, although the Commission was of opinion that it was section 3 that was violated. The Commission's opinion, or even the complainant's charge, as to the section of the act that was supposed to be violated on a given state of facts, was a mere conclusion of law, and not part of the cause of action.

The case gives no support to the proposition that the Commission is at liberty to ignore the facts alleged and the admissions made by the complainant, and to decide, as

matter of fact, that the difference in rates between soap in car-loads and soap in less than car-loads established by Classification No. 20, as amended March 10, 1900, is "inequitable and unjust," when the complaint on which the parties went to trial alleged as matter of fact that it was the proper difference, and sought to establish it, "so as to maintain the proper relation and difference of rates between carload and less than car-lod lots" (R., 12), between which two classes the complaint alleged there was "a constant and sharp commercial competition" (R., 10).

Nor was the circuit court at liberty to enforce the order of the Commission, as it did, on the ground that "the classification of soap for carriage in less than car-loads should * * * not be based upon its relation to soap for carriage in car-load lots" (R., 1091), in the face of the allegation of *fact* in the complaint of the Procter & Gamble Company that they should be classified with reference to each other, because they were in constant and sharp commercial competition.

The opinion of the Commission concedes that soap in less than car-loads should be classified with reference to soap in car-loads, but holds, contrary to the admissions of the complaint and the undisputed evidence as to the extra cost of service, and its own findings in other cases, that the proper "difference" is the difference between class 4 and class 5, and that any greater difference is unjust and inequitable. That is the ground of its decision. There is no finding that any L. C. L. rate for common soap between any points on any of the defendants' roads is unjust or unreasonable in and of itself, nor is the order to discontinue any particular rate. The purpose and effect of the order is simply to establish the *relation* between all rates for soap L. C. L. and the rates, whatever they may happen to be, for the class (5) in which soap C. L. is placed.

LAWRENCE MAXWELL, JR.,
EDWARD COLSTON,
Counsel for the Appellants.

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Supreme Court of the United States.

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No. 201.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, et al., *Appellants*,

vs.

INTERSTATE COMMERCE COMMISSION.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

ORAL ARGUMENT OF EDWARD COLSTON, OF COUNSEL FOR APPELLANTS.

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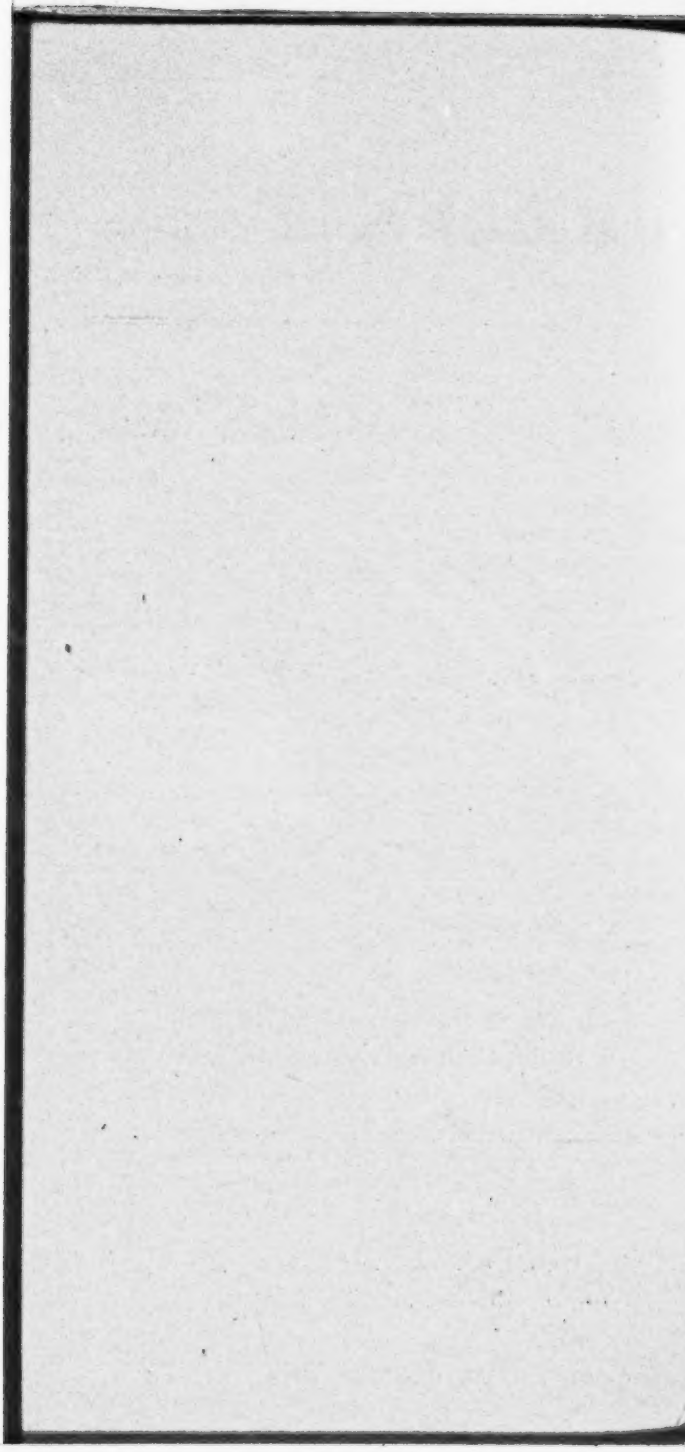

Supreme Court of the United States.

No. 201.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY, et al., *Appellants*,

vs.

INTERSTATE COMMERCE COMMISSION, *Appellee*.

ORAL ARGUMENT OF MR. COLSTON FOR APPELLANTS.

I understand that I was given leave to print my oral argument and to submit it to the court in that form, which I now do.

This case comes into this court on appeal from the Circuit Court of the United States for the Southern District of Ohio, Western Division. Appeal is taken under the proviso of the act entitled "An Act to further regulate commerce with foreign nations and among the states," passed February 19, 1903. (Chap. 708, 32 Stats. at Large, Part I., at p. 849). The suit in the Circuit Court was brought by direction of the Attorney General (Rec. 1093), and the case therefore comes within the terms of above proviso.

Provisions of the Interstate Commerce Act entitled "An Act to regulate commerce" (24 Stats. at Large, 379) involved in this case.

Sec. 1 of said act provides that all charges for "any service rendered or to be rendered in the transportation of passengers or property * * * shall be reasonable and just; and every unjust and unlawful charge for such service is prohibited and declared to be unlawful."

Sec. 3 provides that it shall be unlawful for any common carrier subject to the provisions of the act "to make or give any undue or unlawful preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Sec. 13 of the act provides for investigation by the Commission of complaints "of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof." The investigation is to be had on application to the Commission by petition which shall briefly state the facts. Upon the filing of said petition the Commission is required to forward to the common carrier a statement of charges contained in said petition, and to call upon the common carrier to satisfy the complaint or to answer the same in writing within a time to be specified by the Commission. And it is further provided in said section that if the common carrier shall not satisfy the complaint within the time specified, "it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Sec. 14 provides that it shall be the duty of the Commission, when such investigation is made, "to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are

based." And this section provides that in all judicial proceedings such findings shall be deemed prima facie evidence as to each and every fact found. This section also provides that all reports of investigations made by the Commission shall be entered of record and a copy furnished to the party who made the complaint and to any common carrier that may have been complained of.

Sec. 15 provides that if, in the investigation aforesaid, it shall appear to the satisfaction of the Commission, "that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, * * * it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation" within a reasonable time to be specified by the Commission.

Sec. 16 provides that when the common carrier "shall violate or refuse or neglect to obey any lawful order or requirement of the Commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity, * * * alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter." This section further provides that if on such hearing it be made to appear to the court "that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed" it shall be lawful for the court, by writ of injunction or other proper process, to restrain the common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoin obedience to the same.

It will thus be seen that the investigation by the Commission is to be "of the matters complained of" in the petition. It is only when the common carrier refuses or neglects to obey a lawful order of the Commission that authority is given to apply to the circuit court, alleging violation of such order. That court is given power to hear and determine "the matter," that is to say, the violation or disobedience of a lawful order. The ultimate question in such cases is whether the order of the Commission was a lawful order or not. That is "the matter" which the circuit court is "to hear and determine."

HOW THIS CASE ORIGINATED.

In October, 1899, the classification committee of the railroads for that section of the United States known as Official Classification territory, being the territory bounded on the West by the Mississippi river and Chicago, on the South by the Ohio and the Potomac rivers, on the North by the Canadian frontier, and on the East by the Atlantic Ocean, made a re-classification of the articles, about 8,000 in number, that constitute the subject of railroad transportation in that territory.

In the record at top of page 565, Mr. A. H. McLeod, a witness before the Interstate Commerce Commission, said: "The committee went through the classification and recommended advances on a large number of articles, either from one class to another or from one class to one half of a class, you might say, as for instance from first to first and a half.

The articles that were the subject of transportation had been divided into classes numbered from one to six, both inclusive. Additional classes would be created by doubling some of those mentioned, such as "double first class," "double second class," and so on. The charges for transportation diminished from first class to sixth class by gradation.

This classification committee was termed the "Official Classification Committee;" and their classification was known as "Official Classification." The committee was composed of traffic officers of the leading rail lines in the territory mentioned. The membership of the committee was chosen so as to represent properly the different sections of Official Classification territory; such as New England States, Atlantic States, and the Middle West. The purpose of this committee's classification was to obtain a uniform classification for that extensive and commercially important part of the Union, instead of having a number of classifications, applicable to one road, or perhaps a few roads only.

The formation of this Official Classification Committee, upon the basis above named, was originated by Albert Fink, a man of exceptionally high standing and high reputation in railroad transportation matters. (See record, page 789)

This committee was formed after the passage of the Interstate Commerce Act of February 4, 1887, which became effective April 5 of that year. The first classification was made in April, 1887. Naturally it was somewhat hastily compiled without the benefit of the fuller experience the committee derived from the actual working of their classifications. The committee was composed of fifteen members. When the committee would make a classification it was recommendatory to the various railroads; and they adopted it or not as their judgment suggested. This committee was a standing committee; had a chairman and a place of business in New York City, where it held regular meetings and from time to time attended to revisions of the classifications as occasion would suggest. Of course, the personnel of the committee changed from time to time.

From the date of the first classification, which was April, 1887, to the Fall of 1899, nineteen successive classifications had been made by this committee.

Towards the end of 1899 there had been a great increase in the cost of labor and of all articles entering into railroad uses, which increase constituted a permanent addition to the cost of conducting railroad operations; and it had to be reckoned with by the railroad managers. I may mention a few items of increased cost:

The cost of grading in 1899 over 1898 was 30 per cent. (Rec. p. 632).

The cost of track superstructure per mile increased from $7,500 to $9,500. (Rec. p. 636.)

The cost of bridges increased 40 per cent. (Rec. p. 634.)

The cost of cross ties increased 22 per cent. (Rec. p. 663.)

The cost of steel rails increased from $18 per ton in 1898 to $33 per ton in 1899 (Rec. p. 663).

The cost of locomotives increased 40 per cent. (Rec. p. 503.)

There are tables showing the percentage of increase of cost of all car material and of other items (Rec. 746, 751).

To meet this emergency a revision of the classification, with a view of increasing the revenue of railroads, was deemed necessary. Accordingly a revision of the classification by the Official Clasification Committee was made in the latter part of 1899, to be effective January 1, 1900. It was adopted by the railroads in Official Classification territory. This was Classification No. 20. It gave rise to the present controversy.

The controversy was begun February 24, 1900, by the Procter & Gamble Company, an extensive soap manufacturer at Cincinnati. It complained of the re-classification of common or laundry soap, which was changed by Classification No. 20 from sixth class in car loads and fourth class in less than car loads to fifth class in car loads and third class in less than car loads.

It should be borne in mind that on March 20, 1900, after

the filing of the Procter & Gamble complaint, and on representation and protest from other shippers, another class was created for less than car load traffic, known as 20 per cent. less than third class but not lower than fourth class (for convenience called Rule 26). The reason why this was done is explained in the testimony taken before the Commission, as follows:

"The Chairman: It appears that after Classification No. 20 went into effect there was a conference between the representatives of the railroads and a large number of shippers in reference to the new classification. At that time the third class had not been modified by 20 per cent. reduction, had it —and was it soon after that meeting?

Mr. McLeod: It was not modified until after the conference and a subsequent meeting of the roads to consider all the complaints.

The Chairman: They had this conference with the shippers. Then the roads had another meeting and amended the classification by making third class 20 per cent. less?

Mr. McLeod: Yes, sir." (Rec. p. 568.)

The changes made by Classification No. 20 were by no means confined to soap, but covered over seven hundred articles. Fifty-six articles (car loads) were advanced to fifth class from sixth out of about two hundred articles commonly carried in car loads at sixth class rates in preceding classification. Three hundred articles were moved to third class from fourth class, one hundred and ninety articles to second class from third class, and there were advances made in other classes. (See Rec. p. 565.)

When third class less 20 per cent. not lower than fourth class (Rule 26) was created for less than car loads, which was done for the first time in this classification, soap in less than car load lots, and numerous other articles, over forty in number, which take fifth class in car loads, among them, coffee, sugar, fish (smoked or canned), and canned fruits and

vegetables, were reduced along with soap from third class to third class less 20 per cent. not lower than fourth class. (See Gill, Rec. p. 239, and Commission's Report, pp. 69-70.)

What the petition of Procter & Gamble alleged.

It is of first importance to note the character of the Procter & Gamble complaint. (Rec. p. 7.) In paragraph 3 of that complaint (Rec. p. 9) the statement is made that the carriers in Official Classification territory "adopted a certain classification of articles and property for shipment over their lines, according to which, rates for charging and exacting payment for services rendered for transportation of property and merchandise and in connection therewith were fixed at a certain rate for each class of articles therein set forth. Said classification is known and designated as 'Official Classification No. 20,' and is upon the files of this Commission, and contains six general classes of articles numbered therein from 1 to 6. Upon said classes the defendants have and do fix and maintain decreasing rates in their numbered order."

The precise complaint made of Classification No. 20 was (Rec. top of p. 10) that the carriers had therein wrongly placed and maintained common soap in car load lots in said fifth class instead of said sixth class, "where it properly and rightly belongs," and had wrongly placed and maintained such soap in less than car loads in said third class instead of said fourth class, "where it properly and of right belongs."

The complaint then stated that the difference in rate between third class and fifth class "is very much greater than between said fourth and sixth class."

The complaint also stated that common soap in less than car load lots "is and always has been in constant and sharp commercial competition with common soap in car load lots." (Id.)

The complaint then averred that this Classification No. 20

resulted in charging the complainant an unjust, unreasonable and unlawful rate for transportation services, and that it subjected the soap traffic to an undue and unreasonable prejudice and disadvantage, and subjected soap traffic in less than car load lots to an undue and unreasonable prejudice and disadvantage in commercial competition with soap in car load lots. (Id.)

The complaint further alleged (See bottom of p. 12 of Rec.) that "the same," that is, soap, "should, at least, have remained in sixth class in car load lots, as ordered by this Commission as aforesaid, and in fourth class in less than car load lots, so as to maintain the proper relation and difference of rates between car load and less than car load lots."

It will be observed that there is in this complaint no allegation or intimation of any undue or unreasonable advantage, or undue or unreasonable prejudice or disadvantage as between localities. But that was the principal ground on which the Commission found that Rule 26 violated the Act.

In other words, there is nothing to bring the case within section 3 of the Interstate Commerce Act (February 4, 1887).

The gist of the complaint is: (1) that this change in classification made the rates unjust and unreasonable; (2) that it subjected soap traffic to an unreasonable prejudice and disadvantage as compared with other traffic; (3) that it subjected soap in less than car load lots to an undue and unreasonable prejudice and disadvantage in competition with soap in car loads; (4) that "to maintain the proper relation and difference of rates between car load and less than car load lots" the latter should be fourth class and the former sixth class. (See bottom of p. 12 of Rec.) The Commission in its conclusions (See bottom p. 81 of Rec.) said:

"We regard the primary and controlling question in this case as a question of classification; that is, of relative rates, and dispose of it accordingly. In that view it is sufficient to

hold, that car load soap is not improperly placed in fifth class, and that fifth class rates, therefore, are not shown to be unlawful."

This experienced shipper (Procter & Gamble Co.), whose product the Commission finds was 100,000,000 pounds of soap per year, one tenth of the entire product of the United States, concedes by the allegations of its petition that the correctness of classification between car load soap and less than car load soap depends upon the rate relation between those two competing articles; and that the rate relation is correctly represented by the difference between the rates applicable to fourth class (L. C. L.) and those applicable to sixth class (C. L.) And the Commission having found, as we have just shown, that the controlling question in the case is one of classification; that is to say, one of relative rates, and having further found that fifth class rates for car loads is not unlawful, it follows that when we show from the evidence, as we do show, that the rate relation between fifth class and Rule 26 is not greater, but is in fact less, than the difference in rate between fourth class (L. C. L.) and sixth class (C. L.), we have shown that Rule 26 is a correct classification; and consequently that the Commission was wrong in holding that Rule 26 was a violation of the Act; and its order based on such supposed violation, is not a "lawful" order.

The chief factor in classification of soap as between car loads and less than car loads.

The chief factor in classification of soap as between car loads and less than car loads is the increased expense of carrying soap in less than car load lots over carrying it in car loads. As we have stated, these two soaps are active competitors. The big factories which distribute their product in car load lots sell it in the same markets as the smaller producer who distributes his product in less than car load lots. Ship-

pers' expense of distribution, as far as transportation is concerned, ought to be equalized as near as may be. This is accomplished when the increased cost of handling in less than car loads over the cost of handling in car loads is not exceeded by the difference between the rates for less than car loads and for car loads. So that if the present rate divergence between the two is not more than enough to make up such difference of cost of handling by the respective methods, it must follow that we have reached the right result in the classification adopted, and have done no injustice to the shipper in that respect.

Soap shipped in car loads and soap shipped in less than car loads present the same transportation features, except in the matter of cost of moving. To illustrate this let us take some other articles; for example, take sulphuric acid. When shipped in car loads, and the acid spills by breakage, that represents the whole of the damage; whereas, if one or two or more of the carboys of the acid be shipped in less than car load lots, it will or may be placed in the same car with a great number of other kinds of freight, much of which, very valuable in character, might be destroyed by the breaking of the vessel holding the acid. The carrier must be compensated for incurring that risk. This compensation he attempts to provide for by making a wide divergence between the price of carrying acid when shipped in car loads and when shipped in less than car loads. When shipped in car loads the carrier puts it in fifth class, taking a comparatively low rate, and when shipped in less than car loads he puts it in first class, or perhaps double first class. This classification is intended to have the double effect of discouraging less than car load shipments of commodities that are dangerous when so shipped, and of compensating the carrier for the increased risk arising from that mode of shipment.

Hay affords another illustration. In car loads it is dan-

gerous only to itself; and in less than car loads it is a menace, owing to its inflammable character, to other more valuable freight.

But soap is the same as to every transportation characteristic, save that of expense, whether shipped in car loads or less than car loads. The same kind of boxes are used in each instance; and the cubic space occupied per box is the same; although perhaps soap should pay something, in addition to mere cost of transportation, to represent its liability to damage by other articles in the same car.

A mass of testimony was taken by the appellants in the Circuit Court showing that the extra cost of handling soap in less than car loads is more than the difference between the two classes, namely, third class less 20 per cent. and fifth class. This testimony is found in the record, pp. 107 to 271, and is entirely uncontradicted. The appellee took no testimony in the Circuit Court. This testimony shows that the additional items of expense of less than car load business consist in station facilities, hire of clerks and accountants and of ordinary labor used in loading and unloading, and the additional cost in movement of trains, and in transfer en route of the traffic. In car load shipments the shipper loads and the consignee unloads; the work being done in yards or on side track. But for the less than car load business, there would be no freight depots at all. It will not be necessary for the court to read that evidence because the Circuit Court finds that "the testimony taken since the commencement of this suit shows that the cost of service for handling and carrying freight in less than car loads greatly exceeds the cost of handling and carrying it in car load lots." (See bottom of p. 1090, Rec.)

I desire to call attention to the important fact that the purpose of the Classification Committee in making this new class

(third class less 20 per cent. not lower than fourth class) was to make the difference in rates between that class and fifth class the same as the difference between fourth class and sixth class in the former classification. This is fully explained in the testimony of McLeod before the Commission, and by the statement of the Chairman of the Commission. (See Rec. pp. 572-3; and Rec. p. 613 about middle of page.) And that it had that effect is shown by the evidence of McDonald, principal witness for Procter & Gamble. See Rec. top p. 418.

The grounds upon which the Interstate Commerce Commission found that third class less 20 per cent. not lower than fourth class was an improper classification for less than car load soap.

The "matter" to be determined by the Circuit Court in this case was whether the order of the Commission enjoining carriers from charging rates equal to 20 per cent. less than the rates "fixed by them for the transportation of articles designated as third class in their established freight classification called and known as Official Classification," and "which said 20 per cent. less than third class rates for the transportation of common or laundry soap in less than car loads" were "found and determined in and by said report and opinion of the Commission to be in violation of the act to regulate commerce," was a lawful order. (See Order of the Commission, pp. 83-4 of Rec.)

Section 16 of the act provides that when the common carrier shall refuse "to pay or perform any lawful order or requirement of the Commission, it shall be lawful for the Commission to apply in a summary way by petition to the Circuit Court of the United States sitting in Equity," etc., and that said court shall have the power to hear and determine "the matter;" and that if it be made to appear to the court on such hearing that "the lawful order or requirement

of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction," etc. So, the lawfulness of the order is the matter to be determined in such court proceeding. The lawfulness of the order of the Commission means the correctness of the order of the Commission. The court proceeding is a mode of review of that order, although additional evidence may be heard in such court proceeding. It is therefore proper to consider the grounds upon which the Commission based its said order, as its correctness was the matter, and the only matter before the Circuit Court.

The Commission did not find that the rate divergence between fifth class in car loads and 20 per cent. less than third class was too great; or that it was greater than that between fourth class and sixth class. It did not find that the rates under Classification No. 20 were either unreasonably high for car loads nor for less than car loads; nor did it find that those rates created a prejudice in favor of one kind of freight as against another kind. Those were the only grounds of complaint alleged by the Procter & Gamble Co. in its petition filed with the Commission. On the contrary the Commission says, after disposing of the matter of classification of car loads:

"This disposition of the case, however, will not authorize the retention of car load soap in fifth class if the classification of other articles with which soap is compared should be reduced, nor will anything now decided preclude the Commission from holding, in an appropriate proceeding, that fifth class rates in this territory are excessive."

The Commission did not pass upon the question whether rates were too high, but confined itself to the question of classification, which was purely a matter of relation.

The Commission placed its finding, that third class less 20 per cent. constituted a violation of the Interstate Commerce Act, upon the ground that

"The new class inserted in the Official Classification of March 10, 1900, whereby 20 per cent. less than third class but not lower than fourth class rates are provided for less than car load soap and numerous other articles, operates with respect of soap, as above found in this case, to increase materially the rates paid by complainant and others in the section of country about Cincinnati, and presumably the rates paid by other shippers in most parts of the Central West, while it advances in less degree, or not at all, the less than car load rates paid by soap shippers in New York City and other parts of the East. In other words, the application of a fixed percentage to varying and different rates has the effect of changing the relation of rates which before prevailed on shipments made by complainant, and its competitors in the East, to common territory." (See Rec. p. 82, second par. from top.)

But, in the absence of the fact that the former less than car load rates out of Cincinnati were as high as such rates out of New York, less than car load shippers "in the section of country about Cincinnati," had no vested right that their less than car load rates should not be advanced over their former rates. Nor had they a vested right that, in case of such advance as to them, "soap shippers in New York City and other parts of the East" should have their less than car load rates advanced over their former rates, in equal degree. There was no violation of any provision of the Interstate Commerce Act involved in the mere fact that soap shippers "in the section of country about Cincinnati" paid, under Classification 20, more than they paid under former classification, and that "soap shippers in New York City and other parts of the East" did not pay more, or as much more. Indeed, it is utterly immaterial that the Cincinnati shipper was subjected to an increase over his former low rate, which did not occur to the New York shipper for the reason that his former rates were higher than the rates out of Cincinnati. The material question is; does this new classification make

the Cincinnati shipper pay more money for the same amount of transportation service than the New York shipper pays? It is easy to show that he does not do so. For that purpose we have prepared tables based on distances out of New York and distances out of Cincinnati. These tables have been printed and submitted as part of appellants' argument. These tables are based upon two maps or charts used by the Procter & Gamble Co. in the trial of the case before the Commission, now found at pp. 741 and 742 respectively, of the printed record. These tables show the distances from Cincinnati and New York, respectively, to the points named; the points out of New York being about eighty in number and out of Cincinnati about one hundred and seven; and the tables show the rates for third class, third class less 20 per cent., and for fourth class, and the average rate per mile for each respective class from Cincinnati and New York, respectively, to the respective places named in the tables. A comparison of these average rates shows that both fourth class and third class less 20 per cent. rates out of New York are higher than out of Cincinnati. These tables show that the rate per mile out of New York on third class less 20 per cent. is .12013; on fourth class is .1168, and out of Cincinnati third class less 20 per cent. is .1054, and fourth class is .0898. This shows conclusively that the New York rates are higher than the Cincinnati rates. It shows conclusively that the supposed discrimination against Cincinnati does not exist. The truth is, that under prior classification Cincinnati territory had an advantage over New York territory, and still retains it. Although a Cincinnati shipper may be required to pay more money than formerly, still he does not pay more, if we take the New York rates as the criterion.

The supposed prejudice to Cincinnati locality and advantage to New York locality, on which the Commission based its conclusion of existence of discrimination, rests upon the fact

that the 20 per cent. less than third class rate, when applied to rates for certain distances from New York City, caused no increase or a less increase over fourth class than occurs for like distances when the shipment is from Cincinnati. From this fact the Commission found the Cincinnati shipper is advanced over fourth class more than the New York shipper is advanced for like distances over fourth class; and this the Commission claimed constituted a discrimination against the Cincinnati shipper. To illustrate: suppose for a distance of 100 miles out of New York fourth class rate is 40 cents, and that 20 per cent. less than third class happened to be 40 cents; then we say the New York shipper pays no more than he did before. He has not been raised. But if on a shipment from Cincinnati for a distance of 100 miles the fourth class rate be 30 cents, and 20 per cent. less than third class be 32 cents, it will happen that the Cincinnati shipper pays 2 cents more than he did before. This mere coincidence was paraded by Procter & Gamble in their evidence (although not mentioned in their complaint, wherefore the introduction of said evidence was objected to, see Rec. p. 316) as an advance of their rates, while the New York shipper had no advance; and it was claimed that it constituted a discrimination against the Cincinnati shipper. But, as I have shown, there is no discrimination at all. On the contrary, this new classification of less than car load lots is an approximation towards equalizing rates for the two territories. The supposed discrimination grows out of the fact that fourth class rates out of Cincinnati were less than rates for like distances out of New York. This brought about the result that the percentage reduction from third class would not in many instances bring the rate in Cincinnati territory as low as fourth class, while it would have that effect in New York territory where fourth class rates were higher.

The fallacy of the Commission in finding that this consti-

tuted a discrimination that was a violation of the act, is further shown by one of the illustrations which the Commission itself used. At p. 72 of the record the Commission says that the fourth class rate on soap from Cincinnati to Boston was 34½ cents, and that under the revised classification (20 per cent. less than third) it is 38½ cents; and so, the Commission say, the Cincinnati shipper to Boston has been raised 4 cents per 100 pounds. But, say the Commission, the rate from New York to Boston, fourth class, is 19 cents, and the rate ascertained by deducting 20 per cent. from third class rate is 19 cents also; thus the New York shipper has not been raised over his former rate, while the Cincinnati shipper has suffered a raise of 4 cents. Singularly enough, the Commission failed to notice that even at 19 cents the New York shipper pays for the carriage of his soap much more per mile, and therefore much more for the service rendered, than the Cincinnati shipper pays for the carriage of his product. This is owing to the difference in distances between the two places. It is about three times as far from Cincinnati to Boston as it is from New York to Boston, and the Cincinnati man should pay about three times as much freight money as the New York man; but instead of that he pays only twice as much.

What difference can it make that the shipper is raised over some old rate, if, notwithstanding he pays no more than he ought to pay, and no more than competing territory pays for the same transportation value?

It is obvious that there is no support whatever for the conclusion that the Commission comes to that there is undue and unreasonable prejudice created against Cincinnati territory by this percentage classification.

The essential thing is the proper rate relation between car load shipments and less than car load shipments, the two

soaps being active competitors. And the Commission having held that car load shipments are properly in fifth class, it only remains, in discovering the proper classification for less than car load shipments, to ascertain whether the rate relation existing between third class less 20 per cent. and fifth class, under present classification, is the same as the rate relation that existed between fourth and sixth class under former classification; with which the Procter & Gamble Co. was content, as stated in its petition. For this purpose we used the tables found at pp. 767 and 768 of the record. From them we see that the average present fifth class rate from Cincinnati to twenty-three points is 16.4, and on third class less 20 per cent. the average rate is 22.7. The difference between these is represented by 6.3. The said sixth class rate is 13.4, and the said fourth class rate is 19.4, the difference being represented by 6. It thus appears that third class less 20 per cent. is 38 per cent. greater than present fifth class, but that fourth class is 44.7 per cent. greater than sixth class. So that the rate relation is in favor of the new classification.

McDonald, traffic manager of the Procter & Gamble Company, says that the average increase effected by Classification No. 20 is 17½ per cent. on L.C.L. soap and 20 per cent. on C. L. soap. Rec. 411, 412.

Another ground stated by the Commission for its conclusion (Rec. p. 82) is "that soap in less than car loads always had fourth class rates until January 1, 1900." In other words, until the present classification. From this the Commission seems to have inferred that because the railroads put less than car load soap in fourth class it properly belonged in fourth class and could never be taken out of that class. This shows in a marked degree the confidence which the Commission seems to have in the correctness of the judgment of the railroads on the question of proper classification. By parity of reasoning, which the Commission, however, failed to ob-

serve, the judgment of the same parties, exercised thirteen years afterward, that soap should be placed in another class because of changed conditions in the meantime, was entitled to equal weight. Surely the judgment of the Classification Committee with its fuller experience was as good in 1900 as it was in 1887.

I presume the argument is that placing soap in fourth class may be taken as an admission against interest on the part of the railroads. But it will not be fair to take a part of an admission without the whole of it. The complete admission would be that fourth class was proper during pending conditions, and during the time it was maintained, but that, as conditions have changed, third class less 20 per cent. was proper in 1900.

If we judge the Commission itself, by the argument which it has applied in this case to the conduct of the railroads, we find that from June 22, 1891, to January 1, 1900, a period of nine years, soap in car load lots was put, by order of the Commission, in sixth class. And so, during that period of nine years the relation of car load soap and of less than car load soap was that of sixth class to fourth class. The Commission is solemnly on record as deciding that the proper relation of these two soaps is expressed by the ratio of sixth class in car loads to fourth class in less than car loads. That rate relation is not prejudiced by the present classification (No. 20) because, as already stated, the difference between fifth class and Rule 26 is the same as or less than the difference between sixth class and fourth class in preceding classification.

In the last paragraph on p. 69 the Commission in its findings stated that "a large number of articles in Official Classification territory are fourth class in less than car loads and fifth class in car loads." From this we suppose the inference is intended that soap ought to be in the fourth and in the

fifth class. But the answer is that the articles that are in fifth class for car load rating, and in classes higher than fourth for less than car load rating, are more numerous than or as numerous as those in fourth and fifth. So that there is no force in this suggestion of the Commission.

The Commission also states, and I suppose it is to be taken as a reason for its conclusion, that Western Classification uses fourth and fifth classes, respectively, for soap in car loads and less than car loads, and that the Southern Classification makes no difference whatever between car load soap and less than car load soap. But I submit this furnishes no ground for doubting the correctness of Official Classification. This difference in classification is to be accounted for by a difference in circumstances due to geographical and commercial conditions. If these circumstances did not exist we would not have the classification boundaries that we now have; but we would have uniform classification throughout the entire union. But that has not yet been found practicable. Moreover, why suppose that the judgment of the Western Classification Committee or of the Southern Classification Committee is better than that of the Official Classification Committee?

It does not appear how many classes there are in Western Classification or in Southern Classification, or what the difference is between class 4 and class 5 rates in Western Classification, or what other commodities are in class 4 and in class 5, or what rates are applied to either of those classes. To say, therefore, that soap L. C. L. is placed in what is called class 4 in Western Classification and C. L. in what is called class 5 has no significance, because it does not indicate what rates per mile either pays or what the difference in rates is between the one and the other.

From the foregoing I claim it is apparent that the reasons stated by the Commission are insufficient and incorrect. They

are the result of a misconception of the undisputed evidence in the case. This is particularly so in regard to the conclusion of the Commission that,

"the application of a fixed percentage to varying and different rates has the effect of changing the relation of rates which before prevailed on shipments made by complainant, and its competitors in the East, to common territory."

The fallacy of this position is apparent, and calls for the exercise of the principle stated by this court in Darlington vs. Turner, 202 U. S. at p. 220, as follows:

"We bear in mind the rule that where both courts below have found a particular state of facts, we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence. Now, coming to consider the evidence in the light of this rule, we are constrained to the conclusion that the premise upon which the courts below acted, that is, the existence of a list of notes left by Tracy, is without any support in the evidence, and, indeed, rests upon a mere mistaken assumption."

The Opinion of the Circuit Court.

The Circuit Court merely affirmed the conclusions of the Commission, without adding to them any support. The court failed to recognize the importance of the principal element which should be considered in the classification of soap as between car loads and less than car loads, namely, the difference in cost between the two modes of transportation. The learned court did not allow that consideration a controlling influence. On the contrary the court said that it was not a controlling feature. The court used this language:

"In other words, the classification of soap for carriage in less than car load lots should be based upon its relation to other articles for carriage in less than car load lots, and not upon its relation to soap for carriage in car load lots." (See Rec. p. 1091 near bottom.)

But the court entirely failed to show that soap, when put in third class less 20 per cent., was not in its proper relation to other articles.

The court, while saying that the classification of soap in car loads and in less than car loads, did not depend upon the relation of the two, but upon the relation of soap to other articles, utterly failed to show in what way Rule 26 violated such relation of soap to other articles.

I submit that the decision of the Circuit Court should be reversed.

EDWARD COLSTON,
Of Counsel for Appellants.

February 11, 1907.